BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOSE L. ESCAMILLA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,061,132
METLCAST PRODUCTS	)	
Respondent	)	
AND	)	
	)	
CHARTER OAK FIRE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the August 27, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Mitchell W. Rice of Hutchinson, Kansas, appeared for claimant. Sylvia B. Penner of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 13, 2012, preliminary hearing and exhibits thereto; the transcript of the August 6, 2012, deposition of claimant; the transcript of the August 6, 2012, deposition of Jeff Roudybush; the transcript of the July 12, 2012, deposition of Jeff Roudybush; the transcript of the July 12, 2012, deposition of Tiffany Lininger; and all pleadings contained in the administrative file.

ISSUES

In his Application for Hearing, claimant asserted that on April 26, 2012, as a result of repetitive lifting and operating a grinder, he sustained injuries to his "[n]eck, bilateral upper extremities and all affected body parts."[1] At the preliminary hearing, claimant indicated he had two claims: (1) a neck injury he sustained as the result of a lifting incident at work on April 26, 2012, and (2) bilateral upper extremity injuries resulting from repetitive

[1] Application for Hearing (filed June 12, 2012).

work activities. The date of claimant's bilateral upper extremity injuries by repetitive trauma was also alleged as April 26, 2012, claimant's last day worked.

ALJ Moore determined claimant failed to give timely notice of either injury. He found claimant failed to prove the alleged April 26, 2012, work-related accident was the prevailing factor in causing claimant's injury, medical condition or disability. ALJ Moore also concluded that claimant failed to prove that his repetitive work activities were the prevailing factor in causing him to develop bilateral carpal tunnel syndrome. Claimant appeals the issues of timely notice and prevailing factor. Respondent asks that the Order of ALJ Moore be affirmed.

The issues before the Board are:

1. Did claimant provide timely notice of the accident causing his neck injury?

2. Did claimant provide timely notice that he sustained bilateral carpal tunnel syndrome resulting from repetitive work activities?

3. Did claimant sustain a neck injury by accident arising out of and in the course of his employment with respondent? Specifically, was claimant's alleged work-related accident on April 26, 2012, the prevailing factor in causing claimant's neck injury and current need for medical treatment?

4. Did claimant sustain bilateral upper extremity injuries by repetitive trauma arising out of and in the course of his employment with respondent? Specifically, were claimant's work activities the prevailing factor in causing claimant to develop bilateral carpal tunnel syndrome and his current need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant began working for respondent in December 2005. At the time of his injuries, he worked 40 hours a week as a grinder for respondent, but would usually work 10 hours a week of overtime. He does not speak English proficiently and an interpreter was used to translate at claimant's evidentiary deposition. Claimant's duties included picking up metal parts and placing them on a grinding table. Some of the parts weighed 50 to 60 pounds. Claimant gave limited testimony as to his work duties, including the physical exertion demands and duration.

On April 26, 2012, claimant bent over to get a metal part and felt pain in the neck area and numbness in his arms. Claimant also felt dizzy and lightheaded. Later that day, claimant could no longer continue working because of the injury. When asked if he told

his supervisor why he was leaving work, claimant testified, "I did tell him I was leaving because I didn't know what was going on."[2] Claimant acknowledged that he did not tell his supervisor, Jeff Roudybush, of sustaining a neck injury while picking up a part. Claimant spoke English with Mr. Roudybush and did not use an interpreter.

Apparently, claimant contacted his pastor or pastor's wife, as claimant testified his pastor's wife called Mr. Roudybush. Claimant's pastor and his wife then came to respondent's place of business to take claimant to see a chiropractor. While claimant waited in his pastor's vehicle outside the respondent's business, the pastor's wife went in and spoke to Mr. Roudybush.

The chiropractor provided claimant no treatment and advised him to see his family physician. Claimant was able to see his family physician, Dr. Kyle D. Elmore, on April 26, 2012. Claimant testified that he told Dr. Elmore what caused the neck pain, but later said he did not remember if he told Dr. Elmore how the injury occurred. Dr. Elmore ordered an MRI of claimant's neck, which revealed a disc bulge at C2-3 and a broad-based disc bulge at C5-6 with mild to moderate spinal cord effacement. The notes from the April 26, 2012, visit do not mention a work-related injury, but indicate claimant had been traveling and doing a lot of physical labor. Dr. Elmore's notes indicated bilateral diminished grip strength.

Prior to April 26, 2012, claimant made complaints to Dr. Elmore of neck pain. Dr. Elmore's records reflect claimant reported neck pain on September 27, 2011. Claimant suffered from vertigo and Dr. Elmore diagnosed claimant with cervical vertigo. At claimant's deposition, respondent asked claimant if in September 2011 he had seen Dr. Elmore for neck pain, but claimant did not remember. On October 11, 2011, Dr. Elmore's notes indicated claimant reported the neck pain was gone. Dr. Elmore's notes of April 26, 2012, indicated he had previously referred claimant to see Dr.Trent W. Davis, a neurologist, for bilateral leg paresthesias and was going to have claimant keep his appointment with Dr. Davis.

On April 30, 2012, claimant again saw Dr. Elmore. The doctor's April 30, 2012, notes indicated he saw claimant for neck pain that worsened over the weekend. Dr. Elmore gave claimant an off-work slip. Dr. Elmore's notes from claimant's April 30, 2012, visit indicated claimant requested a note for his boss, who had wanted a more detailed diagnosis. Dr. Elmore's notes indicated he complied with claimant's request. Again, Dr. Elmore's notes from that appointment did not indicate claimant reported his injuries were work related. Dr. Elmore's assessment on April 30, 2012, was a continued disc bulge with radiculopathy into both arms.

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[2] Escamilla Depo. at 6.

Claimant testified that the same day he received the off-work slip he, along with an interpreter by the name of Jose, went to the office of his supervisor, Mr. Roudybush. Claimant testified he gave the off-work slip to Mr. Roudybush and told him of suffering a neck injury. He also told Mr. Roudybush about numbness in his arms, but acknowledged never telling Mr. Roudybush about a wrist injury. Claimant asked if he would be paid for the days he had been off work. According to claimant, Mr. Roudybush indicated claimant would not be paid while off work and for claimant to call his workers compensation insurance company. Claimant testified Mr. Roudybush was in a hurry and indicated he did not have a lot of time to speak to claimant.

Mr. Roudybush was first deposed on July 12, 2012. He is the foundry manager for respondent and is the person employees are to go to if they sustain a work-related injury. Mr. Roudybush testified that on April 26, 2012, a lady came to the office. The lady, who Mr. Roudybush did not know, informed him claimant was sick and dizzy and wanted to go home. Mr. Roudybush told the lady that would be fine.

Two or three days after the April 26, 2012, incident, claimant came to respondent's place of business with another gentleman, who interpreted. Mr. Roudybush asked claimant if he was coming back to work and through the interpreter claimant indicated they were not happy with a doctor claimant was seeing and were going to see another doctor. Mr. Roudybush testified he was not provided an off-work slip by claimant. Mr. Roudybush surmised claimant had an illness and wanted to see another doctor. Mr. Roudybush testified that on previous occasions claimant would become ill and need to stay home. After April 26, 2012, claimant never returned to work, and Mr. Roudybush assumed claimant had quit. Pursuant to respondent's policy, claimant was considered terminated on May 2, 2012. The first time Mr. Roudybush became aware claimant was alleging a work-related injury was when respondent received a certified letter on May 24, 2012, from claimant's attorney. Neither of the parties made the off-work slips part of the record.

Tiffany Lininger, receptionist for respondent, was deposed by claimant. Ms. Lininger testified she was not familiar with claimant and could not pick him out of a lineup. Nor did she know anything about claimant's work injuries. However, one day when Ms. Lininger was working, claimant came into the office with a young female, who Ms. Lininger believed to be claimant's daughter. The female served as claimant's interpreter. Ms. Lininger did not recall the date claimant and the female came into the office. The female asked to speak to someone about workers compensation, and Ms. Lininger paged Mr. Roudybush. Ms. Lininger did not recall claimant giving Mr. Roudybush an off-work slip. Ms. Lininger indicated she heard some of the conversation. She gave the following testimony:

> Q. (Mr. Rice) Did you overhear any of the conversation between --
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> A. (Ms. Lininger) I mean not really. I just continued working, so I mean I just pretty much didn't listen to it because I had no idea what was going on, so I mean -- I don't

> even really think it lasted that long. Jeff I just believe told him we don't do workman's comp if you go home sick and that's pretty much all I remember.
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> Q. But there was a discussion about work comp at least?
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> A. I think he did say something -- or she said something.[3]

Ms. Lininger did not recall claimant coming into the office with a male interpreter and having a discussion with Mr. Roudybush about missing work.

Mr. Roudybush was deposed a second time on August 6, 2012. He testified claimant's job was grinding parting lines of castings (referred to as parts by claimant) that respondent produces. The castings weighed from 1 to 60 pounds. Claimant was assigned a partner, but would do most of the lifting himself. The castings were in a tub raised off the ground so as to limit bending. Mr. Roudybush testified claimant never complained of pain in his wrists or upper extremities. Nor did Mr. Roudybush observe claimant alter how he performed his job as though he might be injured. Nor did any other employee report that claimant had sustained an injury.

Mr. Roudybush again acknowledged he met with claimant a few days after April 26, 2012. His description of that conversation was similar to the testimony he gave at the July 12, 2012, deposition. He did testify that he was never told by claimant of sustaining a neck injury while bending over to lift a casting. A few days after April 26, 2012, Mr. Roudybush was paged by Ms. Lininger to come to the office and visit with claimant.

Claimant did see Dr. Davis on May 2, 2012. Through his interpreter, Jose, claimant related how on April 26, 2012, he lifted a pail of metal parts and felt neck pain and lightheaded. Dr. Davis' notes indicated claimant's pain starts at the top of his head, goes down the neck and travels down the flexor arms to the ring and middle fingers. Claimant complained of pain in both arms. Dr. Davis was very concerned that claimant possibly had cervical spinal stenosis such as from an acutely herniated disc.

Dr. Davis administered bilateral electrodiagnostic tests that demonstrated claimant had bilateral carpal tunnel syndrome, for which Dr. Davis prescribed wrist braces. He diagnosed claimant with bilateral carpal tunnel syndrome, cervical spine disc bulges, right arm weakness secondary to C5 radiculopathy, bilateral arm numbness, hyperreflexia and neck pain. Dr. Davis also administered one epidural steroid injection to claimant's neck.

At the request of his attorney, claimant was examined by orthopedic physician Dr. C. Reiff Brown. Dr. Brown's report indicated that he physically examined claimant, took a history of claimant's neck injury and reviewed the office records of Dr. Elmore and the

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[3] Lininger Depo. at 8.

radiologic reports from the head and cervical spine MRIs. His report indicated that on April 26, 2012, claimant bent to pick up a piece of metal and felt pain in his neck as well as dizziness. Claimant described his radicular difficulties as a sharp pain that extends from the right side of the cervical area into the shoulder, arm, forearm and into the flexor aspect of the hand. As claimant's neck pain became more severe, he would have right arm radiation. He also reported numbness in the right hand that occurred in a global fashion. Claimant denied having these symptoms prior to the current injury. Dr. Brown stated in his report, "In my opinion, this man's neck pain and radicular symptoms are caused by the work that is necessary for him to do and this accident, in my opinion, is the prevailing factor causing the injury, his present medical condition, and need for additional treatment."[4]

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[5] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[6]

K.S.A. 2011 Supp. 44-520 states in part:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
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> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
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> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.

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[4] *Id.*

[5] K.S.A. 2011 Supp. 44-501b(c).

[6] K.S.A. 2011 Supp. 44-508(h).

. . . .

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The earliest date claimant would be required under K.S.A. 2011 Supp. 44-520 to give notice of his neck injury or upper extremity injuries would be 30 days from the date of accident or the date of injury by repetitive trauma, 20 days after seeking medical treatment for his injury by accident or repetitive trauma or 20 days from the last day actually worked, whichever is earliest. In this instance, claimant was required to give notice of the neck and his bilateral upper extremity injuries within 20 days after April 26, 2012, his last day worked and the date he first sought medical treatment. Respondent received the certified letter from claimant's attorney on May 24, 2012, or more than 20 days after claimant's accident and injuries by repetitive trauma. Therefore, the aforementioned certified letter did not provide timely notice.

Claimant testified that on April 30, 2012, through an interpreter he reported injuring his neck and having numbness in his arms to Mr. Roudybush. This Board Member finds claimant's testimony credible that he gave timely notice on April 30, 2012, to respondent of the accident and resulting neck injury and arm numbness. This Board Member is also cognizant of the fact that claimant speaks little or no English. There is nothing in the record to indicate claimant knew or surmised the arm numbness was caused by work-related repetitive traumas. Claimant, and initially Dr. Elmore, was under the impression the right arm numbness was the result of claimant's neck injury. Only in early May 2012 did Dr. Davis diagnose claimant with bilateral carpal tunnel syndrome. That was after claimant's April 30, 2012, conversation with Mr. Roudybush. Claimant could not give notice of an injury of which he is not aware. Therefore, this Board Member finds claimant did not give timely notice of his upper extremity injuries.

It is significant that Ms. Lininger overheard a conversation between claimant and Mr. Roudybush in which workers compensation was mentioned by claimant. Ms. Lininger, a neutral witness, testified that she heard Mr. Roudybush tell claimant that respondent does not do workers compensation for going home sick. Claimant thought his arm pain resulted from the neck injury he sustained on April 26, 2012, but was unaware he had bilateral carpal tunnel syndrome.

After considering all the relevant facts, this Board Member finds that claimant gave timely notice to respondent of the accident and resulting neck injury.

K.S.A. 2011 Supp. 44-508 states in part:

(d) ''Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time

and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. ''Accident'' shall in no case be construed to include repetitive trauma in any form.

(e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

. . . .

> (iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
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> . . . .
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> (g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

This Board Member finds there is sufficient evidence to support a finding that claimant's April 26, 2012, accident was the prevailing factor causing his neck injury and current need for medical treatment. Claimant testified he injured his neck while lifting the metal parts. Dr. Davis' May 2, 2012, notes indicated claimant reported injuring his neck while lifting a pail of metal parts. Dr. Brown opined claimant's accident was the prevailing factor causing his neck injury and resulting radiculopathy and need for medical treatment.

Respondent attempts to use logic to support its argument that Dr. Brown's opinions are not credible. Respondent first states the premise that claimant's medical records indicated he made complaints of neck pain in September 2011 to Dr. Elmore. That is an affirmative premise. Respondent then states that Dr. Brown did not mention in his report claimant's prior neck complaints. That statement, although true, is a negative premise. Respondent then deduces from the two foregoing premises, one negative and one affirmative, that Dr. Brown's opinion on prevailing factor is not credible, as he did not have claimant's complete medical history. That is known as the "*fallacy of an affirmative conclusion from a negative premise*."[7] If that faulty logic was adopted, it would mean that each and every time Dr. Brown did not refer to a preexisting medical condition in a patient's report, then Dr. Brown did not have that patient's complete medical history.

No physician provided an opinion that claimant's work activities were the prevailing factor causing his carpal tunnel syndrome and his current need for medical treatment. Dr. Davis diagnosed claimant with bilateral carpal tunnel syndrome, but did not give an opinion on whether claimant's work activities were the prevailing factor causing claimant's

[7] Douglas Lind, *Logic & Legal Reasoning*, 137-138 (2d ed., NJC Press, 2007).

bilateral carpal tunnel syndrome. Dr. Brown focused on claimant's neck injury and did not comment on claimant's carpal tunnel syndrome. Very little testimony was elicited from claimant about his job activities. Claimant was not asked when his symptoms of hand or arm numbness and pain began or what work activities caused those symptoms. Most of the limited information provided about claimant's work activities was provided by Mr. Roudybush. This Board Member finds claimant failed to prove by a preponderance of the evidence that his work activities were the prevailing factor causing his carpal tunnel syndrome and current need for medical treatment.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

CONCLUSION

1. Claimant gave timely notice of his accident and neck injury, but did not give timely notice of his injuries (bilateral carpal tunnel syndrome) by repetitive trauma.

2. Claimant proved by a preponderance of the evidence that he sustained a neck injury by accident arising out of and in the course of his employment with respondent. Specifically, claimant proved that the April 26, 2012, work-related accident was the prevailing factor causing his neck injury and current need for medical treatment.

3. Claimant failed to prove by a preponderance of the evidence that he developed bilateral upper extremity injuries by repetitive trauma arising out of and in the course of his employment with respondent. Specifically, claimant failed to prove that his work activities were the prevailing factor causing his bilateral carpal tunnel syndrome and current need for medical treatment.

WHEREFORE, the undersigned Board Member reverses that part of the August 27, 2012, Order entered by ALJ Moore finding claimant failed to give timely notice of his April 26, 2012, accident and resulting neck injury and that claimant failed to prove the accident was the prevailing factor in causing claimant's injury, medical condition or disability. The undersigned Board Member affirms the remainder of ALJ Moore's August 27, 2012, Order. This matter is remanded to the ALJ for further proceedings consistent with these findings.

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[8] K.S.A. 2011 Supp. 44-534a.

[9] K.S.A. 2011 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of December, 2012.

THOMAS D. ARNHOLD
BOARD MEMBER

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